GIRDARI LALL AND OTHERS vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Terrell, Ag. C.J., F.M.S., McElwaine, C.J., S.S. and Aitken, J.A.) May 17, 1941]

Appeal—Criminal Procedure—Police photograph of accused produced and put in evidence—Ground for quashing conviction.

The appellants were convicted under Section 392 of the Penal Code of robbing money from one Chan Hock Seng. At the trial, a police photograph of one of the accused was put in evidence. It bore a police number and was a combined profile and full face photograph.

Held, that the production of the photograph would be apt to prejudice a jury and to embarrass a judge. It was obviously a police record and putting it in evidence was tantamount to saying that the man was of bad character. On the facts of the case, the evidence pro and con of robbery was fairly evenly balanced and in the circumstances it would be unsafe to convict.

Cases referred to:—

(1) *Lai Ah Kam vs. Rex* (1939) S S.L.R. 216; 8 M.L.J. 306.

(2) *R. vs. Dwyer* (1925) 2 K.B. 799.

Appellants in person.

T. V. A. Brodie (Deputy Public Prosecutor, F.M.S.) for the Respondent.

The judgment of the Court of Appeal was read by:

McElwaine, C.J., S.S.—The appellants were convicted under section 392 of the Penal Code of robbing Chan Hock Seng of $80 in cash, and sentenced to eighteen months R.I.

There is a great deal in the case which is unsatisfactory. The robbery is alleged to have taken place at about 10 p.m. on 14th December. Chan Hock Seng made no report until he was interviewed by a detective on the 19th. The detective got his information from one Haroun who professed to be an eye-witness but who did not attempt to render assistance to Chan.

The defence was that the complainant, the accused and others were gambling near a rubber estate, that Haroun kept watch for the police and that the complainant lost heavily. The informer Haroun was the moving spirit in the prosecution. He professed to be a reformed gambler with two or three convictions to his credit. After the alleged robbery he went into the second accused's barber shop where the first, second and third accused were present and a fourth man who was acquitted. He had never been in that shop before, and was not on speaking terms with the second accused. Here Haroun professed to see the first accused order and pay for drinks, taking money from a square bag in which was a dhoby receipt, and the second accused take out a round bag from which dropped a pawn ticket which he had seen the complainant purchase earlier that evening. He said that though he had never spoken to the second accused the latter pressed a drink on him and told him not to disclose the secret. Haroun was wrong in the amount on the pawn ticket and in the colour of the writing on the dhoby chit.

The complainant, another gambler with a conviction, knew the first accused. He picked out his photo from a police album, but at an identification parade not only did he not pick him out as one of the alleged robbers but categorically stated that he was not one of the robbers.

In the report which he was more or less compelled to make to the Police he said that apart from a Punjabi he did not know the nationality of his assailants, yet he identified the second accused. There were several other contradictions in his statement and his evidence and the amount he paid for the pawn ticket. His explanation of the discrepancy was contradicted by a Crown witness.

Two independent witnesses, Hendrick and Rodrigo, who lived near where the defence said the gambling had taken place, saw three people running away, and also saw the complainant who told them that $80 had been taken by those people. Rodrigo said that complainant said he had been hammered and robbed of $70 and that he and Hendrick advised complainant (who said he did not want assistance) to report to the police but that he replied that he did not like to go and make a report. On the other hand, however, the complainant when speaking to Tan Hock Hee merely mentioned that he "had lost his money."

Two boys who were called as Crown witnesses went back on their depositions swearing that Haroun had told them what to say. One of these boys said that he saw the accused and complainant gambling.

We entertain grave doubts whether the defence story is not substantially true. The learned Judge thought that unquestionably there had been a robbery, but we cannot accept that view of the facts. It is also unfortunate that the police photograph of the

first accused was produced and put in evidence. Although we were informed that the first accused had never been convicted, the photograph was bound to give a bad impression. It was mounted on a card with several other photos of Indians. It bore a police number and was a combined profile and full face photo. It was obviously a police record and putting it in evidence was tantamount to saying that this man was a bad character. In *Lai Ah Kam v. R.*[1] the Colony Court of Criminal Appeal, following *R. v. Dwyer*[2] quashed a conviction because such a photograph as the present was shown to the Jury. We see no objection to the utilisation of such a photo by the police before arrest to assist them in ascertaining whom they should arrest, but the photograph should not be tendered in evidence by the prosecution. Of course, the police, in showing photographs, must do nothing to suggest that a particular photograph may be that of the wanted man.

The production of the photograph in the present case would be apt to prejudice a jury and to embarrass a Judge, and where evidence pro and con of robbery is fairly evenly balanced, may easily have the effect of tipping the scale.

There probably was some scuffle over gaming in which the complainant lost his money, but it is very questionable whether the complainant ever regarded himself as having been robbed. He was forced to make a complaint to the police and has been dragged reluctantly into the prosecution.

Under all the circumstances we consider that it was unsafe to convict, and we quash the conviction.

Conviction Quashed.

JOHORE REPORT.

PUBLIC PROSECUTOR vs. SIM MOH EE.

[App. Crim. Juris. (Laville, Ag. J.) October 25, 1941]

Laws of Johore, Enactment 102 Sections 9 (1) and 64 — Possession of a still — Factors to be considered in assessing quantum of fine.

In this case the Public Prosecutor appealed against the sentence of a fine of $25.00 or in default 3 weeks r.i. passed on the respondent for the offence of knowingly being in possession of a complete still, an offence under S. 9 of Enactment 102. On the accused's plea of guilty the learned Magistrate did not record any evidence. It was submitted on behalf of the State (a) that there was evidence which should have been called for by the Magistrate that the still was being used for manufacturing illicit samsu on a small commercial scale; (b) that in view of the maximum sentence set out by Section 64 for this offence the infliction of a fine of 1/40 of the maximum was inadequate; and (c) that a deterrent sentence was necessary to safeguard the revenue.

Held, (a) that in assessing the fine for an offence under Section 9 for knowingly being in possession of a still, it would be improper to presume that an offence under Section 8 for distilling liquor without a licence has also been committed and to allow such presumption to influence the weight of the sentence to be inflicted.

(b) that Section 64 is an omnibus section and the maximum penalty laid down should not be taken as a criterion by which to measure all offences punishable thereunder.

(c) that the Court in assessing sentence should not be influenced by the financial position of Government or any of its departments.

Cases referred to:—

(1) *Rex v. Teo Woo Tin* 1 M.L.J. 124.

(2) *Lee Yu Fah vs. Public Prosecutor* 6 M.L.J. 179.

T. D. Hughes, Public Prosecutor, Johore for Appellant.

Respondent in person.

Laville, J.—The State appeals against the sentence of a fine of $25 or in default 3 weeks r.i. passed upon the respondent Sim Moh Ee by the Kota Tinggi Magistrate's Court on 4.9.41 in K. T. Arrest Case No. 273 of 1941.

In that case Sim Moh Ee was charged that he at or about 4.50 p.m. on 27.8.41 in a kongsi at R. E. Malaya Estate Kota Tinggi did knowingly keep or have in his possession custody or control one complete still for the purpose of distilling samsu without a licence, and that by so doing he committed an offence under section 9 (i) punishable under section 64 of Enactment 102 of the Laws of Johore. To this offence accused pleaded guilty and was sentenced to a fine of $25 or 3 weeks r.i. and the still with possession of which he was charged was confiscated.

I have something to say in regard to the charge: the offence under section 9 (i) is conscious possession of a still or other distilling or liquor manufacturing apparatus without having a licence under section 8 of the Enactment: the words "for distilling or manufacturing intoxicating liquor" define the nature of the still and other apparatus and are adjectival: this is plainly seen from their use in section 9 (ii). Mere